AH KAW

v.

AYER KEROH HEIGHTS SDN. BHD.

HIGH COURT MALAYA, MALACCA
MOKHTAR SIDIN JC
[CIVIL SUIT NO. 22-38-1986]
28 AUGUST 1990

CONTRACT: *Sale and purchase of land - Breach - Whether specific performance or damages - Limited company - Appointment of receiver - Duties of receiver.*

On 21 October 1978, the plaintiff AK and the defendant AKH entered into sale and purchase agreement in relation to the said lot and said building which was to be erected by the defendant. In breach of Clause 20 the defendant failed to execute a valid and registrable transfer to AK; the said lot and building was charged to BB and separate title had been issued to AKH on 14 May 1979. AK filed a writ on 13 November 1986; on 2 November 1989 AK filed the present application for specific performance of the 1978 agreement. On 16 November 1988 AKH was placed under receiverships. The defendant argues that this was a case for damages and not specific performance as it was possible for the defendant to perform the contract (as stated in *Mohd bin Bai v. Pembangunan Farlim*).

Held:

In the present case, the building of the house has been completed and separate title had been issued by the land office on 14 May 1979. It is the duty of the receivers who had taken the management of AKH to finds ways and means of redeeming the title from BB - *Mohd Bai's* case distinguished and *Freevale Ltd. v. Metrostore (Holdings) Ltd.* followed.

[Plaintiff's application allowed]

Cases referred to:

Mohammad Baee v. Pembangunan Farlim Sdn. Bhd. [1988] 2 CLJ (Rep) 25
Freevale Ltd. v. Metrostore (Holdings) Ltd. & Anor. [1984] 1 All ER 495

Legislation referred to:

Rules of the High Court 1980, O. 81

For the plaintiff - C.K. Lim; M/s. Taye & Co., Advocates & Solicitors
For the defendant - K. Gomes; Nordin Hamid & Co., Advocates & Solicitors

JUDGMENT

Mokhtar Sidin JC:

This is an application by the plaintiff for Specific Performance of the agreement dated 21 September 1978 pursuant to O. 81 of the Rules of the High Court 1980.

By the agreement dated 21 September 1978, the defendant, Ayer Keroh Heights Sdn. Bhd. agreed to sell and the plaintiff agreed to purchase Lot No. 573, Mukim of Bukit Katil, Melaka (hereinafter referred to as the "said lot") together with a Single Storey Terrace Low Cost House (hereinafter referred to as the "said building") to be erected by the defendant. By Clause 20 of the said agreement, the defendant agreed to execute a valid and registrable transfer of the said lot and the said building to the plaintiff upon the issue of the document in title in respect of the said lot and upon the plaintiff having completed the payments of

the purchase price. The plaintiff had completed the payments of the purchase price. The title of the said lot was issued by the land office to the defendant on 14 May 1979 but it was charged to Bank Bumiputra. On the failure of the defendant to execute a valid and registrable title of the said lot and the said building, the plaintiff filed a writ of summons on 13 November 1986. Nothing was done to the said summons until the 2 November 1989 when the plaintiffs filed the present application by way of summons-in-chambers. By that date the defendant was already in a bad shape. By an order of the Court dated 16 November 1988 the defendant was placed under receivership.

According to the Receiver's Report on 15 November 1989 the estimated deficiency (which amount was owning to secured and unsecured and unsecured creditors) was RM25,000,000 and the estimated total assets of the defendant was valued at RM3,598,326. It was stated in the affidavit of one of the receivers that the financial situation of the defendants at the present stage does not render it possible for the receivers to redeem any of the lands charged by the defendant to the bank. As such it was contended by the defendant that the principle of the case of *Mohammad Baee v. Pembangunan Farlim Sdn. Bhd.* [1988] 2 CLJ (Rep) 25 applied, where it was held that the remedy lies in damages for breach of contract and not a proper case for granting specific performance.

In my view that case is easily distinguishable from the present case. In that case the house was only 75% completed. The defendant had a long history of financial problems and was placed under receivership by the debenture holder. The defendant was unable to complete the construction of the uncompleted units in the housing estate without further financial assistance. In the present case the building of the house had been completed and separate title for the said house had been issued by the land office on 14 May 1979. As such the only thing left to be done was to transfer the said title to the plaintiff. There is no doubt that the title was charged to the bank by the defendant but the plaintiff had paid the purchase price in full to the defendant. In my view it is the duty of the receivers who had taken the management of the defendant to find ways and means to redeem the title from the bank.

In my view the principle enunciated in the case of *Freevale Ltd. v. Metrostore (Holdings) Ltd. & Anor.* [1984] 1 All ER 495 applied in the present case. It was held in that case that:

> Where a limited company enters into a contract to sell land, thereby conferring on the purchaser an equitable interest in the land, the fact that the vendor company is placed in receivership by a debenture holder of the company prior to a completion of the contract does not destroy the purchaser's equitable interest in the land under the contract and substitute for it a mere right to claim damages against the vendor company if the contract is not completed, instead the vendor company remains liable to complete the contract. Accordingly, this appointment of a receiver does not itself afford the vendor company a defence to a claim by the purchaser for specific performance of the contract.

As such I will allow the plaintiff's application for Specific Performance with costs.

Also found at [1990] 2 CLJ 969